IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 34618

STATE OF WEST VIRGINIA EX REL. KATHRYN KUTIL AND CHERYL HESS, PETITIONERS

VS.

THE HONORABLE PAUL M. BLAKE, JR., JUDGE OF THE CIRCUIT COURT OF FAYETTE COUNTY; WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES; AND MARTHA YEAGER WALKER, SECRETARY, RESPONDENTS

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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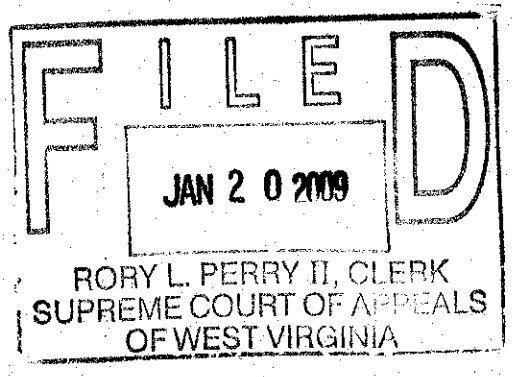

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I. INTRODUCTION

This is a response by the Honorable Paul M. Blake, Jr., Judge of the Circuit Court of Fayette County, to a petition for writ of prohibition filed by the petitioners, Kathryn Kutil and Cheryl Hess, challenging the respondent's interpretation and application of W. Va. Code § 49-2B-2, which provides, "'Foster family home' means a private residence which is used for the care on a residential basis of no more than five children who are unrelated by blood, marriage or adoption to any adult member of the household;" W. Va. Code § 48-22-201, which provides that, "Any person not married or any person, with his or her spouse's consent, or any husband and wife jointly, may petition a circuit court of the county wherein such person or persons reside for a decree of adoption of any minor child or person who may be adopted by the petitioner or petitioners;" and Rule 41(a)(6) of the Rules of Procedure for Child Abuse and Neglect which provides that "matters to be considered at the permanent placement review conference shall include . . . [t]he appropriateness of the current placement, including . . . whether or not it is the . . . most family-like one[ ] available."

Specifically, the petitioners challenge the respondent's ruling that they were in violation of West Virginia law by maintaining children in their home in excess of the statutory limit; that West Virginia law does not permit the adoption of children by unmarried couples; and that the law and the evidence presented favored a permanent placement and/or adoption into a two-parent household, and seek to interfere with the removal of an infant being maintained in their home in excess of the statutory limit and the placement of that infant with a married couple whom the Department of Health and Human Resources [DHHR] has identified as suitable and prospective adoptive parents.

The respondent respectfully submits that his application of West Virginia law to the facts of this case was correct and that (1) the petitioners' foster care home is being illegally maintained in violation of West Virginia law; (2) the petitioners, as an unmarried couple, may not adopt under West Virginia law; and (3) a placement of the child in a two-parent home is more appropriate under the circumstances.

Moreover, the respondent respectfully submits that he did not, based upon the conflicting evidence presented, commit any substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts by holding that the subject placement was not the "most family-like one available" and ordering that consideration be given to the adoption of the infant, BGC,[1] by a "husband and wife jointly," who would provide the additional stability of two adoptive parents, as opposed to a single adoptive parent, particularly as both DHHR and BGC's guardian ad litem have concurred in the respondent's interpretation of West Virginia law and a suitable married couple has been identified by DHHR who has visited the child and who desire to adopt her.

II. STATEMENT OF FACTS

On December 8, 2007, BGC was born to a drug-addicted mother.[2] On December 11, 2007, DHHR filed an abuse and neglect petition after being advised of the situation.[3] On December 13, 2007, the respondent granted custody to the DHHR, while BGC was still

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[1] The infant's initials are used in this response for privacy reasons. *See, e.g., Rebecca C. v. Michael B.*, 213 W. Va. 744, 745, 584 S.E.2d 600, 601 (2003)("This case involves a child ('B.L.C.') who was born in May of 1988. The child's mother ('R.L.C.') is the appellant in this case, and the child's father ('M.J.B.') is the appellee; we use initials for privacy reasons.").

[2] ***Exhibit 1*** at 1-2.

[3] *Id.*

hospitalized[4] and, on December 24, 2007, BGC was placed in a foster home upon her discharge from the hospital.[5]

On January 24, 2008, the guardian ad litem appointed for BGC, Thomas K. Fast, Esq., filed a motion to remove BGC from the foster home.[6] On January 31, 2008, DHHR objected to the removal of BGC from the foster home.[7] That same day, the foster parents filed their own response objecting to removal of BGC from the foster home.[8]

Although hearings were scheduled on the guardian ad litem's motion, those hearings were continued when the natural mother's motion for an improvement period was granted. Eventually, the natural mother's parental rights were terminated and on October 28, 2008, the multidisciplinary team conducted a meeting and reported as follows: "MDT members also discussed Tom Fast's pending motion in regard to Ms. Kutil and Ms. Hess' same sex relationship and their ability to appropriately foster and adopt children. MDT members agreed that 'nothing more can be done' until this case is transferred and the Adoption Unit makes an official recommendation in regarding to [BGC's] perspective adoptive parents."[9]

On October 31, 2008, DHHR issued its permanency plan stating as follows: "It is the department's position that the interests of [BGC] would be best served by facilitating an adoption. Kathryn Kutil and Cheryl Hess have expressed their desire to adopt [BGC] which

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[4] ***Exhibit 2.***

[5] ***Exhibit 3.***

[6] ***Exhibit 4.***

[7] ***Exhibit 5.***

[8] ***Exhibit 6.***

[9] ***Exhibit 7.***

would be appropriate . . . ."[10] Thereafter, the matter came on for permanency hearing on November 6, 2008,[11] and on November 12, 2008,[12] an order was entered[13] reflecting the respondent's findings, which included the following:

> 7. The intervenors are a same-sex couple who provide DHHR approved foster care in their home to a number of children. Over the objections of the guardian ad litem, this Court permitted [BGC] to remain in the intervenor's care as a temporary foster care placement by Order entered February 25, 2008. Further, and over the guardian ad litem's objection, the Court permitted the foster parents to intervene in this matter. . . .
>
> 12. DHHR counsel asserted that the *Permanency Plan's* recommendations were appropriate and in the best interests of the child. Counsel for the DHHR also informed the Court that the DHHR had scheduled transfer of the matter to the DHHR's Adoption Unit and that, after investigation of the case, the Adoption Unit would then submit a recommendation to the Circuit Court regarding who should adopt [BGC]. Counsel for the DHHR stated that the guardian ad litem, the intervenors, and the intervenors' counsel would be consulted during the Adoption Unit's investigation. . . .

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[10] ***Exhibit 8.***

[11] ***Exhibit 9.***

[12] Four days after the hearing, the petitioners filed a "Motion to Disqualify Presiding Circuit Judge," claiming that the respondent should not proceed with entry of an order or further proceedings because he "appears to have a personal bias or prejudice concerning the intervenors because of they are a same sex couple." ***Exhibit 10*** at 5. The Honorable Elliot E. Maynard, Chief Justice of this Court, entered an administrative order dated November 14, 2008, denying this motion. Not only would the respondent never discriminate against any party or other person with whom he deals based upon their sexual orientation, the Code of Judicial Conduct under which he serves expressly provides, "A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon . . . sexual orientation . . . and shall not permit staff, court officials and others subject to the judge's direction and control to do so." This case is not about sexual orientation, it is about the petitioners' compliance with the law limiting the number of children in their care; the discretion of circuit courts in abuse, neglect, and adoption proceedings; and the legislative preference for placement of children for adoption in two-parent households.

[13] ***Exhibit 11.***

16. The guardian ad litem stated on the record that he strenuously objected to the last portion of the *Permanency Plan* and stated that he did not agree with the MDT's recommendation that the intervenors be permitted to adopt the child.[14] The Court notes that unmarried couples may not adopt children in West Virginia. Only one of the intervenors could petition for adoption. (See W. Va. Code §48-22-201, which states that: "*Any person not married or any person, with his or her spouse's consent, or any husband and wife jointly, may petition a circuit court of the county wherein such person or persons reside for a decree of adoption of any minor child or person who may be adopted by the petitioner or petitioners.*"). . . .

22. Counsel for the intervenors stated that the Circuit Court is the final arbitrator of whether or not the Adoption Unit's ultimate recommendation is approved, and that the Court would do so by entering an order, with findings of fact and conclusions of law, regarding the Adoption Unit's recommendation.[15] Counsel for the intervenors stated that he would welcome an evidentiary hearing before this Court regarding the issues raised in this matter.

23. The Court agreed with the DHHR's *Permanency Plan* to the extent that it recommended adoption of the child. However, the Court **FOUND** that the *Permanency Plan* would have been more appropriate and acceptable if the *Permanency Plan* simply stated that the DHHR would facilitate adoption of the child. . . .

26. The Court stated that it had the authority to reject foster placement with the intervenors at the beginning of the case but did not do so because the Court felt that the intervenors could provide *temporary foster care* to the child pending resolution of the case and the location of a permanent/adoptive placement for the child in a traditional,[16] most family-like home setting.[17] At that time, the

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[14] ***Exhibit 9*** at 15-16.

[15] *Id.* at 18 ("[T]he Adoption Unit, with input from the guardian, with input from the ongoing worker, interviews prospective adoptive candidates and ultimately makes a recommendation as to whom they believe should be the individual or individuals who should petition for adoption. And my recollection is . . . that ultimately the circuit court is the final arbiter of whether or not that recommendation is accepted.").

[16] The petitioners have mischaracterized the respondent's use of the term "traditional" to mean a heterosexual, as oppose to a homosexual household. It was clear at the hearings, however, that the respondent's use of the term "traditional" referred to a two-parent, rather than a

Court's tentative approval of placement of the child in the intervenor's home was based on the fact that the arrangement was for *temporary foster care* during the pendency of the case, not for permanent adoption or placement.

27. The Court informed the parties that it appeared to the Court that, after efforts to place the child with its half-sister's father and its grandparents failed, the DHHR failed to pursue placement of this child in the traditional most family-like home setting with a mother and father.

28. It appears to the Court that . . . the DHHR unilaterally determined that place with the intervenors is sufficient, appropriate, and in the best interest of the child. In light of the DHHR's argument that this Court lacks the authority in this case to approve, disapprove, or modify the *Permanency Plan* as submitted, it appears to the Court that the DHHR is attempting to avoid, circumvent or, at the very least, delay any challenge or objection to its unilateral decision that placement of this child in the intervenors' nontraditional home is in the best interest of this child and the best course of action in this case.

29. It also appears to the Court that the fairness showed by the Court in allowing the child to remain with the foster parents pending resolution of the case is now being used to support the argument that, since the child is developing bonds with the intervenors, the child should not be removed from the intervenors' care, and that adoption by the intervenors should be recommended without pursuing adoptive parents which could provide a more traditional family-like home setting.

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single-parent household. *See* ***Exhibit 13*** at 43-44 ("Q. And in your experience in being in the Adoption Unit that DHHR is involved in, can you tell me, based on your knowledge, as to what percentages of adoption are by a single parent or single person verses a traditional family of a mother, father?"). The use of the terms "traditional," referring to a two-parent household comprised of a husband and wife and "non-traditional," referring to other types of households, is certainly not unique to the respondent. *See, e.g.,* Note, *Adoption in the Non-Traditional Family – A Look at Some Alternatives*, 16 Hofstra L. Rev. 191 (1987).

[17] ***Exhibit 9*** at 21-22 ("This Court had the authority to reject the foster placement of this little girl in this present foster home at the time this case was first instituted. I didn't do that, or this Court didn't do that because, in the best interests of the child, it was felt that these ladies could provide appropriate and suitable foster care for the children. . . . And it's nothing against these ladies. They've given this child good care while this matter is pending before the Court.").

30. The Court **FINDS** that in Fayette County, West Virginia a traditional family is considered to consist of both a mother and a father and that the most family-like home setting for a placement/adoption of a child is in a home consisting of both a mother and a father.

31. The Court **FINDS** that children need both mother and father and that avenues to such a result should at least be explored by the DHHR. The Court **FINDS** that untraditional family settings should not be the first and only route taken by the DHHR when searching for a permanent/adoptive placement for a child.

32. In the present matter, it appears to the Court that the DHHR, from the beginning, avoided a road to a traditional family placement for [BGC].

Based upon these findings of fact, for which there was more than sufficient evidentiary support, the respondent made the following conclusions of law:

4. The Court **CONCLUDES** that Circuit Courts are not required to accept the *Permanency Plan* of the DHHR and may either accept, reject or modify said recommendation depending on whether or not the Court finds it to be in the best interests of the child at issue.

5. The Court **CONCLUDES** that the polar star in all matters involving children is what is in the best interests of the child. . . .

7. The Court **CONCLUDES** that the standards and guidelines in the Rules applicable for permanency placement review hearings are also applicable and should be considered during the initial permanency plan hearings. Pursuant to these standards and guidelines imposed upon the Courts, the Court must consider, among other things, the appropriateness of the current placement of the child and whether it is the most family-like setting. *See Rule 41(a)(6).*

8. The Court **CONCLUDES** that, if at all possible, it is in the best interest of children to be raised by a traditionally defined family, that is, a family consisting of both a mother and a father. The Court **CONCLUDES** that non-traditional families, such as the intervenors, should only be considered as appropriate permanent/adoptive placements if the DHHR first makes a sufficient effort to place the child in a traditional home and those efforts fail. In other words, if the DHHR has attempted in good

faith to secure a traditional family to adopt the child, and the DHHR's attempts fail, then a non-traditional family may be considered as an adoptive placement.[18] This did not occur in the present case.[19]

9. For the above stated reasons, the Court **CONCLUDES** that it can only tentatively approve the *Permanency Plan* pending argument/hearing to address the issues raised in this hearing regarding the *Permanency Plan*, including the extent of the Court's authority over the execution of the *Permanency Plan*, (i.e. approval, disapproval of the DHHR recommendation, etc.), and argument/evidence in support of and in opposition to the guardian ad litem's pending motions.

10. The Court **CONCLUDES** it is necessary and in the best interest of the child to ORDER that DHHR place the child in a traditional home setting with a mother and a father. The Court deems such action necessary to materially promote the best interest of the child. In recognition of the bond that may have formed between the child and the intervenors, and to lessen any stress on the child, the Court **CONCLUDES** that it is in the best interests of

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[18] *Id.* at 22-23 ("[I]f you look at all the cases involving children, the polar star that guides this Court is what is in the best interest of the child; not some group of society, what they might want, or what these ladies might want or what Mr. Fast might want, but what is in the long-term best interests of [BGC]. And . . . this Court's opinion is that the best interest of a child is to be raised by a traditional family, mother and father. Now, that's this Court's opinion as to what a typical West Virginia would feel and what the typical attitude is of the West Virginia Supreme Court, a traditional family. Now, occasionally there may be situations where there is no traditional family, a young couple that are willing and able to adopt a little girl. And if that's the situation, if there's no other alternative for a traditional family, then you look at a nontraditional family, whether it be two men, two women or such.").

[19] *Id.* at 23-24 ("But it appears to the Court in this case, for whatever reason, the Department of Health and Human Resources has made a decision that closes out that traditional family route for [BGC]. . . . All through this case it's been abundantly clear that the DHHR is going to see – or wants this child adopted by this same-sex couple. . . . I believe that this Court has seen the value of having a father/daughter relationship, having a mother/daughter relationship. And that doesn't have anything to do with whether these ladies are giving this child good care or not. And as long as that avenue or alternative is available out there, it ought to be explored. It shouldn't be closed. And if the DHHR comes back before this Court at some point and says, 'Judge . . . we've looked through all the alternatives for this child, and there is no traditional family we can approve for adoption. Our option in the best interest is for this same-sex couple to adopt,' I'd approve it. But I don't believe you ought to close that door to a traditional family, and I get the impression in this case it is.")

> the infant child that removal from the intervenors' home and placement in a traditional home should be completed over a two week transitional period.[20] **The purpose of the removal and transfer to a traditional home is to materially promote the best interests of the child by encouraging and facilitating adoptive placement of the child with a traditionally defined family and to ease the child's transition when and if such adoptive placement occurs.**[21]

Thereafter, the respondent entered an order on November 18, 2008, staying removal of BGC from the petitioner's home,[22] and a hearing was promptly scheduled for November 21, 2008,[23] which the petitioners attempted to prevent by filing a motion for emergency stay and petition for writ of prohibition with this Court.[24] This Court did not interfere, however, with the respondent's proceeding with this hearing and on December 2, 2008,[25] the respondent entered an order explaining what had transpired in the interim as follows:

> [T]he Court then informed the parties that on this date, prior to the commencement of the hearing, it received and reviewed a facsimile from Angela Ash, counsel for the DHHR, stating the DHHR's position that infant [BGC] should be removed from the intervenors' home and placed in another foster care home. In such

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[20] This was consistent with W. Va. C.S.R. § 78-2-12.2.l which requires that DHHR "[g]ive foster parents ten (10) working days notice prior to removing a child, unless it is an emergency situation." As this was not an emergency situation, the ten working day period was deemed appropriate.

[21] *Id.* at 27 ("That child is to be placed in a traditional home with a mother and a father and, to lessen the stress on the child, it should be done over a period of time, so that this little girl gets to be acquainted with and familiar with the home in which she's being placed, the appropriate foster home. I believe it would be too traumatic to take the child at this time and just uproot her right now.").

[22] ***Exhibit 12.***

[23] ***Exhibit 13.***

[24] ***Exhibit 14.***

[25] ***Exhibit 15.***

> filing,[26] the DHHR took the position that [BGC] needed to be removed from the Kutil-Hess household because the household is over capacity and the DHHR had found a potential adoptive home for [BGC], (the home of Amy and Roger Thompson.) The Court stated that this position was significantly different than the factual circumstances presented to this Court by . . . [the] DHHR child protective services worker, during and prior to the last hearing held in this matter on November 6, 2008.[27]

Thereafter, in the respondent's order, he carefully summarized the arguments and testimony of those who participated in the proceedings as follows:

> Regarding the DHHR's present position that [BGC] should be removed from the intervenors' home, Ms. Ash informed the Court that since entry of the November 12, 2008 Order, the DHHR found that the Kutil-Hess home has seven children, (one over capacity), and one of the children must be moved. Counsel for the DHHR informed the Court that no waiver was available except for siblings. Counsel for the DHHR informed the Court that the DHHR found a potential adoptive home . . . that of Amy and Roger Thompson . . . that [BGC] had visited the home of the potential adoptive parents, and that the transfer to the potential adoptive family could be finalized by next week. . . .[28]
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> Mr. Ciliberti further stated that the DHHR's actions during the past week and throughout the case were despicable, pointing out that the DHHR placed the child in the intervenors' home knowing that the intervenors' were a same-sex couple and that their household

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[26] ***Exhibit 16*** at 1 ("DHHR agrees that [BGC] needs to be moved . . . for the following reasons . . . it was premature for the caseworker to make a recommendation of whom would be adopting as this case had not been reviewed by the adoption unit . . . the recommendation of both foster parents to adopt is an incorrect statement of law; only a single person or married couple may adopt and not a co-habiting unmarried couple . . . it came to DHHR's attention yesterday that the Kutil/Hess home is over capacity and a child needs to be removed . . . DHHR has a foster home willing to adopt [BGC] and Amy and Roger Thompson have visited with the child at least twice over the last two weeks and could finalize transition by next week.").

[27] ***Exhibit 13*** at 10-11. *See also* ***Exhibit 9***.

[28] ***Exhibit 13*** at 12-14.

was crowded, that an MDT was not held with regard to the DHHR's current position . . . .[29]

The DHHR . . . called Ms. Jody Conner, Mercer County DHHR, Region Four, Adoption Supervisor. . . . Ms. Conner testified that the *Permanency Plan* is now *adoption in a home that will best address and meet the child's needs and best interests*. Ms. Conner testified that the DHHR found a potential adoptive home for [BGC] and has begun transition to that home, that [BGC] has visited the home twice, that the prospective adoptive parents have expressed willingness to adopt [BGC], and that the family is ready to take custody of [BGC] at any time. . . . Ms. Conner testified that the DHHR would place the child in the potential adoptive family with a six month trial period and that the child could be removed at that time. . . . Ms. Conner testified that the DHHR did not consult a psychologist but that the Court's *Order* required a two week transitional period and **that DHHR policy provided for a two to three week transitional period.** . . .[30]

Ms. Ash then called Amy Hunt, DHHR Adoption Unit, Region Four, Home Finding Supervisor. . . . Ms. Hunt testified regarding the criteria used by the DHHR Adoption Unit to locate a prospective adoptive home. . . . Ms. Hunt testified that in screening prospective adoptive parents the DHHR does not consider the sexual orientation of the families, that the DHHR does not discriminate as long as the families are stable, and that this is true for both foster and adoptive parents. . . .[31]

Mr. Fast then called Heather Hunter, (now Heather Lucas), Fayette County DHHR child protective service worker. . . . Ms. Hunter/Lucas testified that when placing children she does not give regard to sexual orientation and that she was not aware whether or not the DHHR has a policy regarding the orientation of the parents or of any data used by the DHHR with regard to the long term effect of placement in a homosexual home . . . .[32]

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[29] *Id.* at 18-19 ("The conduct of [DHHR] in the past week to two weeks has been . . . despicable. They approved these two women as foster parents, knowing they were a same-sex couple. And now that things are getting a little hot in the kitchen, they want to cut and run. This filing by Ms. Ash is garbage.").

[30] *Id.* at 30-42.

[31] *Id.* at 50-57.

[32] *Id.* at 61-65.

Mr. Fast then called Sharon Hess, intervenor. Ms. Hess testified that she lives with Ms. Kutil, and that they are DHHR approved foster parents of seven children. The Kutil-Hess home has four bedrooms. [BGC] sleeps in crib in Ms. Kutil and Ms. Hess' room, as is allowed by DHHR policy until age two. Ms. Kutil and Ms. Hess share a bed. Ms. Hess testified that she and Ms. Kutil are not married under the laws of any U.S. state.[33]

Mr. Fast then called his expert witness, Dr. Tracey Hansen, PhD. . . . Dr. Hansen offered the following opinions to the Court: (1) the optimal family structure is the traditional mother-father stable home with married parents; (2) placement in a homosexual home effects/causes differences in the development of children; (3) the optimal environment is with married mother-father family; (4) children from other family structures are negatively impacted; (5) the absence of a father has a significant negative impact; (6) fathers contribute in a unique way to a child's development; (7) raising children in a homosexual home is not the optimum or best choice when other options are available; and (8) while the quality of parenting is important, the relationship between the adults in the household, regardless of orientation, is also important. Dr. Hansen also testified that she was not of the opinion that all same sex couples are unfit and stated that same sex couples can raise healthy children. . . .[34]

Mr. Ciliberti then called his expert witness, Dr. Christine Cooper-Lehki, WVU/UHA Assistant Professor of Clinical Psychiatry. . . . Dr. Cooper-Lehki testified that, based on her review of the literature, she did not agree with Dr. Hansen's opinion that being raised by homosexual parents leads to sexual acting out or increased instances of homosexual activity, etc. Dr. Cooper-Lehki agreed that it would be ideal to have a married mother and father with no conflict to adopt a child. . . . When questioned by Mr. Fast as to whether placement in a good mother-father traditional adoptive home would be at least the second best circumstance, (second to being in a home with two biological parents who wanted and loved her), Dr. Cooper-Lehki opined that this might have been true if [BGC] had been placed in such a home immediately, but that it could not happen now. . . . Dr. Cooper Lehki offered the following additional opinions to the Court: (1)

[33] *Id.* at 67-71.

[34] *Id.* at 86-127.

sexual orientation was not one of the most influential or negative factors in a child's development; (2) the most important positive factor is the quality of parenting and the parents' interaction with the children; (3) the most negative factor would be a parents' mental illness, substance abuse, lack of finances, prior CPS involvement; (4) sexual orientation was not one of the negative factors; (5) the factors cited are reliable and do not have anything to do with sexual orientation; (6) it is widely accepted that, psychologically and medically speaking, that there is no difference between homosexual and heterosexual parents; (7) generally, it is well accepted in the medical community that the controversy concerning homosexual parenting is more philosophical than medical in nature; (8) most people who are gay did not have gay parents; (9) literature does not support the claim that homosexual parenting leads to homosexual activity; (10) bonding starts at birth; (11) at [BGC]'s eleven months, significant developmental milestones have already passed (e.g., establishment of trust, security, etc.); (12) the fact that [BGC] is only eleven months old does not mean she has not bonded with the care givers, despite the fact that she cannot express herself in words; (13) with regard to the other children in the intervenors' home, there is a probable bond with [BGC]; (14) sudden removal from the home could cause a number of negative impacts physically and cognitively, and would be very disruptive; (15) [BGC] will not have any clear memories but could have emotional problems due to being overwhelmed by the removal; (16) with regard to the appropriate transfer of the child, Dr. Cooper-Lehki would not recommend moving the child quickly and would not recommend removal without evidence of abuse and neglect, (Dr. Cooper-Lehki stated specifically that she had considered the intervenors' sexual orientation in making this statement); and (17) if there is a need to remove a child from the home due to overcrowding, the child with the least bonding should be removed and that this is usually the most recently placed child. . . .[35]

Mr. Ciliberti then called Mr. Kathryn Kutil, intervenor. . . . During her testimony, Ms. Kutil testified that she is in an intimate relationship with Ms. Hess. Mr. Kutil testified that the children have never asked her about their relationship, but that if they asked she would tell them that they cared about each other. Ms. Kutil testified that the children only see that they care about each other and that they are not overly affectionate in front of the children. . . .

[35] *Id.* at 129-182.

> Ms. Kutil testified that she and Ms. Hess have served as a foster family in Fayette County for two years. . . . At present, Ms. Kutil's adopted twelve-year old girl and six foster children reside in the Kutil-Hess home. M[s]. Kutil also testified that they would make sure the children had proper male role models, if such were needed. . . . Ms. Kutil testified that an emotional bond with [BGC] does exist. . . . Ms. Kutil testified that the other children have also bonded with [BGC]. Ms. Kutil testified that [BGC] considers their family as her family and knows no one else.[36]

After weighing this testimony and these arguments, the respondent entered an order on December 2, 2008, making the following findings and conclusions:

> 13. The Court FINDS that the Kutil-Hess household may be the most appropriate adoptive placement home for the child, but it is unfair not to allow the child the option to be adopted by a traditional family. The child should be given the opportunity to be adopted by mother-father adoption and not be locked into a single parent adoption.
>
> 14. The Court FINDS that trauma is always involved when removing children, that is why the Court sought to accomplish removal with a two week transition period while the child was still of tender years. While transferring custody may initially cause trauma, this does not mean that a child who has lived in a certain household for a period of time may never be moved.
>
> 15. The Court FINDS that the *Permanency Plan* of transition to the DHHR Adoption Unit is appropriate and should be accepted by this Court.
>
> 16. The Court FINDS that [BGC] is presently in the intervenors' home, however, the DHHR has found the intervenors' home is over capacity and has asked the Court to remove the child with a transitional period, based upon that reason. Thus, the Court FINDS that [BGC] should be moved immediately. The Court FINDS that placement of [BGC] in a home with a married mother and father pending such adoption process is most appropriate for the child's well being. . . .

[36] *Id.* at 188-202.

> 1. The Court CONCLUDES that the intervenors can not adopt this child as a couple because of statute. The intervenors argue that ***they*** are the only proper parties to be considered . . . however, under West Virginia law . . . only married couples, married persons with the consent of their spouse, or single persons may petition to adopt a child. For this reason, the Court CONCLUDES that the intervenors cannot lawfully petition ***together*** to adopt [BGC], ***only one*** of the two intervenors may petition for adoption.
>
> 2. The Court CONCLUDES that the DHHR's request for removal based upon the fact that the intervenors' home is overcapacity should be GRANTED as it is in the child's best interest. Further considering the well-being of the child, the Court CONCLUDES and ORDERS that the child be removed from the intervenors' home by 12:00 noon November 22, 2008.
>
> 3. The Court CONCLUDES that, contrary to the argument of the guardian ad litem, the constitutionality or unconstitutionality of the DHHR adoption process and policies is not before the Court in this proceeding.

On November 24, 2008, after the respondent had announced his ruling at the November 22, 2008, hearing, the petitioners filed a motion for emergency stay of order with this Court,[37] which was amended on November 25, 2008.[38] The DHHR filed a response to this motion, noting that (1) the language in the permanency plan regarding the appropriateness of the petitioners' as adoptive parents for BGC was without supervisory approval and outside the CPS worker's authority; (2) the petitioners' home was over capacity under DHHR regulations; (3) DHHR had a foster home willing to accept BGC, but did not have a foster home available for the child last placed in the petitioners' home; and (4) DHHR concurred in the respondent's decision

[37] ***Exhibit 17.***

[38] ***Exhibit 18.***

to remove BGC from the petitioners' non-complying home and place BGC with a suitable foster family who desired to adopt her.[39]

On November 26, 2008, this Court entered an order staying the respondent's rulings and directing that BGC be returned to the petitioners' care pending resolution of the petition for writ of prohibition.[40]

On December 4, 2008, the petitioners served an amended petition for writ of prohibition, contending as follows:

> 1. The respondent abused his discretion in ordering the removal of BGC for non-compliance with DHHR regulations regarding the number children in the petitioners' household;
>
> 2. The respondent abused his discretion in ordering that preference be given in the placement of BGC to two-parent permanent placement and/or adoption; and,
>
> 3. The respondent abused his discretion by violating the petitioners' "fundamental constitutional rights to family, privacy and equal protection under law without due process."[41]

The respondent submits, however, that (1) the law requires that one child be removed from the petitioners' home and it was not an abuse of discretion, under the evidence presented, to remove BGC from the petitioners' home; (2) the law and the circumstances of this case favor a placement of the child with two-parents who desire to adopt her; (3) no constitutional right to "family, privacy and equal protection" was violated by the respondent's application of West Virginia law nor were the petitioners' due process rights violated; and (4) the respondent committed no substantial, clear-cut legal error plainly in contravention of a clear statutory,

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[39] ***Exhibit 19.***

[40] ***Exhibit 20.***

[41] ***Exhibit 21*** at 2-3.

constitutional, or common law mandate which may be resolved independently of any disputed facts, which is required for issuance of a writ of prohibition.

III. DISCUSSION OF LAW

A. STANDARD OF REVIEW.

"'[W]rits of prohibition," this Court has noted, "'provide a drastic remedy to be invoked only in extraordinary situations.'"[42] Consequently, this Court has "long held that, '[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers.'"[43] In this case, there is no dispute that the respondent had subject matter and personal jurisdiction to enter the orders challenged.

Moreover, notwithstanding the petitioners' arguments to the contrary, there can be no legitimate dispute regarding any alleged abuse of discretion as "simple abuse of discretion" is insufficient to support issuance of a writ of prohibition.[44] Rather, the question is whether the

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[42] *State ex rel. Shrewsberry v. Hrko*, 206 W. Va. 646, 649, 527 S.E.2d 508, 511 (1999)(citation omitted).

[43] *State ex rel. Nationwide Mut. Ins. Co. v. Karl*, 222 W. Va. 326, 330, 664 S.E.2d 667, 671 (2008)(citation omitted).

[44] Consequently, this Court has previously refrained from interfering with circuit court decisions where the exercise of discretion with respect to children was involved. *See, e.g., State ex rel. West Virginia Dept. of Health and Human Resources v. Fox*, 218 W. Va. 397, 404, 624 S.E.2d 834, 841 (2005)("the circuit court did not clearly err when it returned physical and legal custody of Sean to his parents, Charles and Miranda"); *State ex rel. Brandon L. v. Moats*, 209 W. Va. 752, 754, 551 S.E.2d 674, 676 (2001)("we find no constitutional infirmities with the grandparent act and conclude that Petitioners have not demonstrated the necessary requisites for the issuance of a writ of prohibition. Accordingly, we deny their request for extraordinary relief."); *State ex rel. Rose v. Pancake*, 209 W. Va. 188, 191, 544 S.E.2d 403, 406 (2001)("While W. Va. Code, 49-6-7 specifically permits a relinquishment of parental rights, it clearly suggests that such an agreement may be invalid if it is not entered into under circumstances that are free of duress and fraud. Whether there has been fraud or duress is a question of fact that must be determined by the circuit court judge."); *State ex rel. Evelyn W. v. Madden*, 202 W. Va. 634, 637,

respondent committed "'substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts[45] and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.'"[46]

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505 S.E.2d 697, 700 (1998)("Under the peculiar circumstances of this case, where our earlier mandate was, in substantial part, predicated on procedural deficiencies, and where the circuit court's motivation is to promote the paramount goal of the law as recognized and endorsed by this Court, this Court does not believe that the circuit court has engaged in a sufficiently egregious act in delaying the implementation of our earlier mandate to justify the issuance of a writ of prohibition . . . ."); *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 568, 490 S.E.2d 642, 655 (1997)("In our review of the record we find that the circuit court was not clearly erroneous, in determining that the guardian ad litem failed to establish that there was no reasonable likelihood the conditions of neglect could be substantially corrected."); *State ex rel. Chris Richard S. v. McCarty*, 200 W. Va. 346, 351, 489 S.E.2d 503, 508 (1997)("In the present case, the lower court was presented with evidence indicating that two children were in the physical custody of a woman who had allegedly tied one of her own natural children to a chair, and medical reports were presented indicating that one of these natural children had been bruised and required medical treatment subsequent to whipping with a belt. While we are not so naive to dismiss the possibility of fabrication or exaggeration, if a court is to temporarily err, it should be upon the side of the children.").

[45] Here, the only undisputed issues, i.e., the fact that the number of children in the petitioners' home were in violation of West Virginia law; the fact that the child protective services worker lacked lawful authority to grant a waiver of such statutorily-imposed limit; the fact that the child protective services worker lacked lawful authority to advise the petitioners that the adoption unit would recommend the adoption, all supported the respondent's rulings. On the other hand, all of the other issues raised by the petitioners, i.e., whether the child had psychologically bonded with the petitioners to the degree that it would be too traumatic to effectuate another placement; whether the benefits of a two-parent adoption outweighed the benefits of a single-parent adoption; and whether sexual orientation should be a factor in weighing a two-parent adoption against a single-parent adoption, were all "disputed" and because they were "disputed," cannot serve as the basis for issuance of a writ of prohibition.

[46] *State ex rel. Games-Neely v. Sanders*, 220 W. Va. 230, 233, 641 S.E.2d 153, 156 (2006)(citation omitted). In addition to the remedy of appeal due to their status as intervenors, the respondent notes that DHHR has provided foster parents, like the petitioners, with an administrative remedy: "An agency shall develop and implement a written grievance procedure for children and foster, adoptive, and biological families. The procedure shall be written in clear and simple language and shall include at least the following provisions: 26.1. An agency shall ensure that children and their biological families can express concerns or make complaints without fear of retaliation; 26.2. The grievance procedure shall ensure due process; and 26.3. The

B. THE EVIDENCE WAS UNDISPUTED THAT THE NUMBER OF CHILDREN IN THE PETITIONERS' FOSTER HOME EXCEEDED THE STATUTORY LIMIT SET FORTH IN W. VA. CODE § 49-2B-2(p).

W. Va. Code § 49-2-10 provides, "It shall be the duty of the state department in cooperation with the state department of health to establish reasonable minimum standards for foster-home care to which all certified foster homes must conform. . . . Any such home that conforms to the established standards of care and to the prescribed rules shall receive a certificate from the state department, which shall be in force for one year from the date of issuance and which may be renewed unless revoked because of wilful violation of the provisions of this chapter. The certificate shall show the name of the persons authorized to conduct the home, its exact location and the number of children that may be received and cared for at one time. No certified foster home shall receive for care more children than are specified in the certificate." (emphasis supplied). Thus, the Legislature has conditioned participation in the foster care program upon a limitation of the number of children who may be maintained in each foster home and has prohibited foster homes from receiving for care more children than are permitted.

With respect to the number of children who may reside in a foster home, W. Va. Code § 49-2B-2 provides, "'Foster family home' means a private residence which is used for the care on

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child's primary case manager shall explain the procedure to the child and his or her biological parents or guardian upon admission and obtain written acknowledgment that an explanation of the procedure has been provided." W. Va. C.S.R. §78-2-26.

a residential basis of no more than five children who are unrelated by blood, marriage or adoption to any adult member of the household." (emphasis supplied).[47]

In this case, it was undisputed that seven children were residing in the petitioners' home, only one of whom was related by adoption to the petitioners. Thus, at the time of the hearings, it was illegal for the petitioners to be maintaining six children in their home who were unrelated by blood, marriage or adoption, and the respondent certainly did not err, as a matter of law, in making such finding.[48]

C. THE LAW IS CLEAR THAT THE PETITIONERS, AS A COUPLE, ARE NOT PERMITTED TO ADOPT ANY CHILD.

The petitioners have jointly filed a petition for writ of prohibition expressly seeking "a Writ of Prohibition . . . prohibiting [the respondent from] ordering the West Virginia Department of Health and Human Resources to remove the infant respondent from the home of the

[47] Likewise, W. Va. C.S.R. § 78-2-3.18 provides, "Foster Family Home. -- A private residence used for the residential care of five (5) or less children who are unrelated by blood or adoption to any adult member of the household." *See also* W. Va. C.S.R. § 78-2-13.3.a ("The total number of children in a foster home, including the family's own children living in the home, may not exceed six (6).").

[48] Both in the circuit court and in this Court, the petitioners make the argument that DHHR somehow waived the statutory limitation on the number of children they are permitted to maintain in their home, but the Legislature has limited the authority of DHHR to grant waivers or variances only to its rules, not to statutory mandates. *See* W. Va. Code § 49-2B-7 ("Waivers or variances of rules may be granted by the secretary if the health, safety or well-being of a child would not be endangered thereby. The secretary shall promulgate by rule criteria and procedures for the granting of waivers or variances so that uniform practices may be maintained throughout the state."). Moreover, it is undisputed that the rules and procedures promulgated by DHHR for the granting of waivers or variances were not employed in this case; rather, it is undisputed that a DHHR child services worker acted unilaterally, without her supervisor's approval, and in excess of her authority. The State could not function if its officers and employees, in excess of their authority, simply chose to ignore the dictates of State law. Accordingly, this Court has long held that, "'Acts of a private agent may bind the principal where they are within the apparent scope of his authority; but not so with a public officer, as the State is bound only by authority actually vented in the officer, and his powers are limited and defined by its laws.'" Syl. pt. 4, *Samsell v. State Line Development Co.*, 154 W. Va. 48, 174 S.E.2d 318 (1970)(citation omitted).

Petitioners based solely on their status as a non-traditional household."[49] Thus, the petitioners, as a couple, seek to preclude the respondent from enforcing his order removing BGC from their foster home.

The petitioners have also jointly requested that "a Writ of Prohibition . . . be issued prohibiting DHHR[50] from removing B.T.C. from the Petitioners' home absent any concern for the child's health, safety, or welfare and directing that the Petitioner, Kathryn Kutil, and her household be considered the primary candidate as an adoptive parent."[51] West Virginia law, however, prohibits unmarried couples, regardless of sexual orientation, from jointly adopting children.[52]

First, W. Va. Code § 48-22-103 provides, "'Adoptive parents' or 'adoptive mother' or 'adoptive father' means those persons who, after adoption, are the mother and father of the child." Thus, the Legislature has expressed, in this definitional section, for adoptions by mothers and fathers.

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[49] ***Amended Petition for Writ of Prohibition*** at 13. Obviously, BGC was not removed solely because of the petitioners' "non-traditional household," but rather, the primary reason was that they were operating a foster home in violation of West Virginia law.

[50] Of course, as a non-judicial body, no writ of prohibition would lie against DHHR. *See* W. Va. Code § 53-1-1 ("The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers."); *Carey v. Dostert*, 185 W. Va. 247, 252, 406 S.E.2d 678, 683 (1991)("only judicial acts can be prohibited by a writ of prohibition.")(citation omitted).

[51] ***Amended Petition for Writ of Prohibition*** at 13 (emphasis supplied).

[52] West Virginia is certainly not unique in favoring two-parent adoptions over single parent adoptions. Indeed, the "second-parent adoption" movement was born out of statutory restrictions on two-parent adoptions by unmarried couples. *See* 25 Causes of Action 2d *Cause of Action for Second-Parent Adoption* (2008).

Second, W. Va. Code § 48-22-201 provides, "Any person not married or any person, with his or her spouse's consent, or any husband and wife jointly, may petition a circuit court of the county wherein such person or persons reside for a decree of adoption of any minor child or person who may be adopted by the petitioner or petitioners." (emphasis supplied). Thus, only three classes of persons are permitted to adopt under West Virginia law: (1) an unmarried person; (2) a married person with his or her spouse's consent; and (3) a husband and wife jointly.[53]

Finally, this Court has held "that adoptions in West Virginia, and elsewhere, are governed by statute. 'The proceedings being wholly statutory, adoption may be effected only by compliance with the prescribed requirements of law.'"[54] The Legislature has simply not provided for adoption by two or more persons who are unmarried, regardless of sexual orientation.[55] Thus, the petitioners may no more adopt BGC than an unmarried man and a woman may adopt her, and the respondent certainly did not err, as a matter of law, in so holding.

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[53] Again, even though West Virginia permits adoption by single parents, regardless of their sexual orientation, it is not unique in not permitting joint adoption by unmarried couples. *See* 1 T. Jacobs, CHILDREN & THE LAW: RIGHTS AND OBLIGATIONS § 4:68 (2008)("By custom, joint adoption by an unmarried couple seems to be unavailable as an option, even in places where openly gay or lesbian people are allowed to adopt as individuals.").

[54] *In re the Adoption of Jon L.*, 218 W. Va. 489, 494, 625 S.E.2d 251, 256 (2005) (citation omitted); *see also* 2 Am. Jur. 2d *Adoption* § 13 (2008)("adoption statutes are in derogation of the common law and thus must be strictly construed")(footnotes omitted).

[55] Indeed, for this reason, DHHR's regulations provide, "An agency shall accept applications from and recruit foster and adoptive parents with the life experiences, personal characteristics and temperament suitable for working with children in need of care and shall provide verification of marital status, if applicable, upon request." W. Va. C.S.R. § 78-2-13.1.a (emphasis supplied).

D. APPLYING THE CHILD PLACEMENT AND ADOPTION STATUTES, AS WELL AS THE RULES OF THIS COURT, TO THE FACTS AND CIRCUMSTANCES OF THIS CASE SUPPORT THE RESPONDENT'S RULING THAT IT IS APPROPRIATE FOR CONSIDERATION TO BE GIVEN TO PLACEMENT OF THE CHILD WITH A MARRIED COUPLE WHO IS SUITABLE AND INTERESTED IN ADOPTION.

Before the respondent or any court can approve an adoption, the Legislature has dictated that "all applicable provisions of this article have been complied with" and "it is in the best interests of the child to order such adoption."[56]

As previously noted, although the Legislature has enacted a statute permitting unmarried persons to adopt children, its statutes indicate a preference for adoption by married couples. Moreover, Rule 41(a)(6) of the Rules for Child Abuse and Neglect Proceedings, governing the permanent placement review conference, which is the proceeding being conducted in this matter, provides, "Unless otherwise provided by court order, matters to be considered at the permanent placement review conference shall include a discussion of the reasonable efforts made to secure a permanent placement, including . . . The appropriateness of the current placement, including . . . whether or not it is the least restrictive one (most family-like one) available . . . ." Obviously, a two-parent, as opposed to a single-parent, placement is preferable because it generally provides a more family-like environment, with the stability that a two-parent household offers.

With respect to a "post-termination placement plan," which is to be discussed at the permanent placement review conference, Rule 41(b) of the Rules for Child Abuse and Neglect Proceedings provide:

> Within ninety (90) days of the entry of the final termination order or decree for both parents,[57] the Department responsible for placement

[56] W. Va. Code §§ 48-22-701(a)(1) and (2).

> of the child shall submit a written permanent placement plan to the court, the guardian ad litem, persons entitled to notice and the opportunity to be heard, and other remaining parties, if any, for consideration at the permanent placement review. The plan shall include the following:
>
> (1) A description of the Department's progress toward arranging an adoptive, legal guardianship, or permanent foster care home placement for the child;
>
> (2) Where adoptive, legal guardians, or permanent foster care parents have not been selected, a schedule and a description of steps to be taken to place the child permanently;
>
> (3) A discussion of any special barriers preventing placement of the child for adoption, legal guardianship, or permanent foster care and how they should be overcome; and
>
> (4) A discussion of whether adoption and/or legal guardianship subsidy is needed and, if so, the likely amount and type of subsidy required.

Here, however, it is undisputed that the permanency plan, dated prior to actual termination of parental rights,[58] was erroneously submitted by the DHHR child protective services worker as, pursuant to an MDT status report issued earlier, the case was being transferred to Jodi Conner, Adoption Supervisor in DHHR's Regional Adoption Unit.[59] At the hearing conducted on November 21, 2008, Mr. Conner made clear that her unit had never recommended adoption of BGC by the petitioners:

> Q. During the MDT, -- how long had you had the case before that MDT occurred?

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[57] The final termination order for both parents was entered on November 5, 2008. ***Exhibit 22.***

[58] ***Exhibit 8.***

[59] ***Exhibit 7.***

A. One day. It was staffed to me on November the 5th. The court hearing was on November the 6th.

Q. During that MDT, did you at any point state for a final recommendation that the Kutil/Hess home would be the adoptive home?

A. No, I did not. . . .

Q. And the recommendation from the Adoption Unit on November 6th,was that to have the Kutil/Hess home adopt Baby Cales?

A. No. That was – the permanency plan – I never seen a permanency plan that was submitted. I never reviewed. The only thing that I asked be put in there is that the child be in an adoptive home as the permanency plan, no specific name on there.

Q. So the permanency plan for the Department was actually just to transition to the Adoption Unit for adoption?

A. Yes.

Q. And after that investigation, after appropriate issues addressed by the guardian ad litem, then a final recommendation of who would adopt would be made.

A. Yes.[60]

Respectfully, what the petitioners are attempting to do is to circumvent the statutes, rules, regulations, and authority of the court, the DHHR, and the guardian ad litem, by using their status as foster parents who have had the child since her birth in December 2007 to force an adoption because the infant has bonded with them and they are an otherwise fit household. Indeed, they are seeking to deny the very due process to the others involved in the system that they allege is being denied to them.

[60] ***Exhibit 13*** at 28-30.

Ms. Conner, as the duly-authorized adoption supervisor, made clear at the hearing that DHHR fully intends to comply with its legal obligations concerning this case:

> Q. At this point today, what is the permanency plan of the Department?
>
> A. The permanency plan is adoption for the child in a home that will best suit the baby's needs in the present and the future. . . .
>
> Q. Did you find another foster home that is willing to adopt Baby Cales?
>
> A. [A]fter I assigned the case to Ms. Terri Farley, she also – I told her to start looking for an actual adoptive home. She did manage to find one during that time, and she started like --- I think she contacted Ms. Kathy Kutil and Cheryl Hess regarding that situation, and they started the transition of letting the baby visit with the home.
>
> Q. So this new foster home is willing to adopt, they've had some visits with [BGC]?
>
> A. To my knowledge, yes, they have had two visits. And it has been relayed tome the information that they do want to adopt a third child. . . .
>
> Q. From today forward, how soon could that transition be finalized?
>
> A. To my knowledge, the family is ready to take the child at any given time.[61]

Finally, Ms. Conner explained that DHHR has removed children who have resided in foster homes for periods of similar duration;[62] that DHHR's guidelines for transition take into account the emotional and psychological well-being of those children;[63] and that DHHR

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[61] *Id.* at 30-32.

[62] *Id.* at 38.

[63] *Id.* at 41.

considered the emotional and psychological well-being of BGC in its initial steps to transition her from the petitioners to her prospective adoptive family.[64]

[64] *Id.* at 41-42. The petitioners rely, in part, on the argument that because they have become the "psychological parents" of BGC, the respondent is now precluded from ordering a different placement. First, as noted by the United States Supreme Court in *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 844 n.52 (1977), "this case turns, not on the disputed validity of any particular psychological theory, but on the legal consequences of the undisputed fact that the emotional ties between foster parent and foster child are in many cases quite close, and undoubtedly in some as close as those existing in biological families." Second, as noted in *Smith*, courts have "'particularly rejected the notion, if that it be, that third-party custodians may acquire some sort of squatter's rights in another's child.'" *Id.* at 857 (Stewart, J., concurring)(citation omitted). *See also Drummond v. Fulton County Dept. of Family and Children's Services*, 563 F.2d 1200, 1207 (5th Cir. 1977)("the only time potential parents could assert a liberty interest as psychological parents would be when they had developed precisely the relationship which state law warns against the foster context"); *Lofton v. Secretary of Dept. of Children and Family Services*, 358 F.3d 804 (11th Cir. 2004)(rejecting foster parents' argument that status as "psychological parents" created a liberty interest in family integrity); *Gibson v. Merced County Department of Human Resources*, 799 F.2d 582 (9th Cir. 1986)(even if foster parents' interest in having foster child remain in their care rose to level of protectable liberty interest, procedures employed satisfied due process concerns). Finally, even this Court, which has extended the concept of "psychological parent" to foster parents, has stated that the relationship upon which a claim of "psychological parent" is based "must have begun with the consent and encouragement of the child's legal parent or guardian" and such did not occur in this case. Syl. pt. 3, *Tina B. v. Paul S.*, 217 W. Va. 625, 619 S.E.2d 138 (2005)("A psychological parent is a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support. The psychological parent may be a biological, adoptive, or foster parent, or any other person. The resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the child's legal parent or guardian.")(emphasis supplied).

Here, the evidence was that the petitioners became foster parents of BGC with neither the consent nor the encouragement by either her biological mother or DHHR that they become her psychological parents. Indeed, the evidence was that one of the petitioners had adopted one foster child, but had not expressed an interest in adopting any other of the other many foster children placed in their home. Moreover, the DHHR representative testified that the permanency plan was a transition of the case to the adoption unit. ***Exhibit 13*** at 29. The expert evidence in the case was also conflicting. Dr. Trayce Hansen, PhD, a licensed psychologist, testified extensively regarding a number of studies indicating that a child in BGC's circumstances would benefit from a two-parent adoption. *Id.* at 86-110. For example, Dr. Hansen testified that, "The American College of Pediatrics determined that the traditional family structure provides the best

Other courts have discussed the superior nature of a two-parent, as opposed to a one-parent adoption. Ironically, in *In re Adoption of M.M.G.C.*,[65] the issue was discussed in the context of an effort by an Indiana lesbian couple to effectuate a "second-parent adoption" where only one of the two domestic partners had previously adopted the children involved. Militating in favor of such effort, in the court's view, was that allowing "second-parent adoption" would further the state's interest in promoting stability for adopted children:

> [W]e have noted that the primary concern in every adoption proceeding is the best interest of the child. *B.G. v. H.S.*, 509 N.E.2d 214, 217 (Ind. Ct.App. 1987). "The state has a strong interest in providing stable homes for children. To this end, early, permanent placement of children with adoptive families furthers the interests of both the child and the state." *Id.* A two-parent adoption enables a child to be raised in a stable, supportive, and nurturing environment and precludes the possibility of state wardship in the event of one parent's death. Such an adoption also legally entitles the child to both parents' employer-and/or

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physical and mental health and superior educational attainment for children and decreases the likelihood that they will use or abuse drugs or alcohol, less likely to be promiscuous and to be involved in criminal behavior." *Id.* at 94. On the other hand, Christi Cooper-Lehki, D.O., testified criticized some of the studies relied upon by Dr. Hansen and indicated that a number of national professional organizations have issued position statements regarding sexual orientation as a non-factor in the parenting of children. *Id.* at 142-159. She did concede that the American College of Pediatrics has concluded, "Child-rearing studies have consistently indicated that children are more likely to thrive emotionally, mentally and physically in a home with two heterosexual parents versus a home with a single parent," although she indicated that she disagreed with the statement. *Id.* at 180-181.

Neither Dr. Hansen or Dr. Cooper-Lehki, however, had conducted any investigation of the petitioners, BGC, or the specific circumstances of this case, and neither offered an opinion, one way or the other, on whether the petitioners are the "psychological parents" of BGC. Indeed, the best that Dr. Cooper-Lehki could state, based upon her general experience and not upon any specific investigation ("there's no research about this particular child," *id.* at 169), was that BGC "could have" formed an emotional bond with the petitioners. *Id.* at 160. Moreover, she conceded that children "won't have clear memories at eleven months of age, because they don't have words. You don't have very clear specific memories until you develop words, and that's around age three." *Id.* at 164.

[65] 785 N.E.2d 267 (Ind. Ct. App. 2003).

> government-sponsored health and disability insurance; education, housing, and nutrition assistance; and social security benefits. Undoubtedly, it would be in the best interest of the three children in the instant case to be entitled to the legal protections and advantages that a two-parent adoption provides.[66]

Likewise, in the instant case, if BGC is adopted by the two-parent family identified by DHHR, she will have the additional legal protections attendant to children of married couples. Both of her parents will need to submit themselves to family court if they desire to divorce one another. The petitioners, on the other hand, would be required to submit to no civil authority if they decide to separate.[67] She will have the choice of two possible custodial parents in the unfortunate event they should divorce and her non-custodial parent will likely be required to pay child support if her parents are divorced. The petitioners would offer only one legally-obligated custodial parent and the non-custodial parent would have no legal obligations, including a legal obligation to pay child support if they separate. She will be entitled to be named as a dependent

[66] *Id.* at 270 (emphasis supplied); *see also In re Adoption of M.A.*, 930 A.2d 1088, 1097 (Me. 2007)("A joint adoption assures that in the event of either adoptive parent's death, the children's continued relationship with the surviving adoptive parent is fixed and certain. A joint adoption also enables the children to be eligible for a variety of public and private benefits, including Social Security, worker's compensation, and intestate succession, as well as employment benefits such as health insurance and family leave, on account of not one, but two legally recognized parents. Most importantly, a joint adoption affords the adopted children the love, nurturing, and support of not one, but two parents.")(also in the context of a same-sex adoption).

[67] Of course, when same-sex partners do separate and the effect on their children rises to the level of abuse and/or neglect, courts may intervene. *See, e.g., Palazzolo v. Mire*, 2009 WL 103957 at *1 (La. Ct. App.)("This is a child custody and visitation dispute between two mothers-a biological mother, June Mire; and an adoptive mother, Angela Palazzolo-of an eleven year old girl, I.P.FN1 For twenty-four years, Ms. Mire and Ms. Palazzolo were lesbian partners. During that time, they jointly decided to have a child by artificial insemination. The child, I.P., was born in 1997. For more than six years, the trio lived together as a family, first in California and then in Louisiana. When the relationship between Ms. Mire and Ms. Palazzolo ended, a dispute arose between them over custody and visitation. This suit followed. Following a lengthy trial, judgment was rendered awarding Ms. Mire sole custody and terminating Ms. Palazzolo's visitation rights. From that judgment, Ms. Palazzolo appeals.").

and beneficiary on both parent's health and disability insurance policies. She might not be eligible to be named as a dependent and beneficiary on both of the petitioner's health and disability insurance policies. She will be entitled to a number of governmental benefits from both parents, including educational, housing, nutritional, and social security benefits. She might not be eligible for those benefits from both of the petitioners. She will be entitled to benefit from the laws of descent and distribution for both parents. She would not benefit from the laws of descent and distribution from both of the petitioners. Perhaps, eventually, federal and state law will change and all of these benefits will be afforded to children regardless of the sexual orientation of their parents. Until that occurs, however, there are obviously a number of benefits for children who are adopted by two-parent families.

Certainly, the respondent does not dispute and has never disputed that the petitioners may provide a loving and nurturing environment for BGC, but all things being equal, the law and the evidence in this case clearly favor a two-parent, as opposed to a one-parent adoption.

E. ALTHOUGH FOSTER PARENTS ARE ELIGIBLE TO BECOME ADOPTIVE PARENTS, THEIR SERVICE AS FOSTER PARENTS IS CONDITIONED UPON THEIR AGREEMENT TO COOPERATE WITH DHHR IN THE ADOPTION PROCESS.

Certainly, foster parents are eligible to become adoptive parents,[68] but their service as foster parents is expressly conditioned upon their agreement to cooperate with DHHR in the

[68] Moreover, there is nothing in West Virginia law prohibiting foster care and adoption by gay and lesbian individuals. Indeed, as previously noted, the respondent placed BGC with the petitioners knowing their sexual orientation and has indicated on the record that if a suitable couple cannot be located, would favorably consider approving adoption by Ms. Kutil. According to one recent study, three percent of the foster children in the United States are living with gay or lesbian parents and an estimated 65,500 adopted children are living with a gay or lesbian parent. G. Gates, L.M.V. Badgett, J.E. Macomber, and K. Chambers, ADOPTION AND FOSTER CARE BY LESBIAN AND GAY PARENTS IN THE UNITED STATES at Executive Summary (2007). The right of any single person to adopt, however, regardless of sexual orientation, "is not absolute but

adoption process, including the transitioning of foster children into adoptive homes. W. Va. C.S.R. § 78-2-23.1, for example, expressly provides:

> Foster Parents' Role In Adoption Planning. If a child is in placement with foster parents, an agency shall include the foster parents in the child's adoption planning team by:
>
> 23.1.a. Explaining the foster parents' role in the adoption process;
>
> 23.1.b. Informing them of all plans for the child, including the child's placement planning; and
>
> 23.1.c. Providing support to them after the child has been placed in an adoptive home.

The system cannot function in the manner in which it was intended if foster parents can use their status as foster parents to contradict the decisions of circuit courts, the DHHR, and guardians ad litem as to placements for adoption that are determined to be in the best interests of a child.

F. THE PETITIONERS WERE AFFORDED INTERVENOR STATUS AND THEIR FULL DUE PROCESS RIGHTS.

The hearing on November 21, 2008, commenced at 1:18 p.m. and concluded at 6:20 p.m.[69] The petitioners, who had been given intervenor status, appeared in person and by counsel. Both petitioners testified at the hearing and offered the testimony of an expert witness. At the conclusion of the testimony of Ms. Hess, her counsel was offered an opportunity to examine her, but he declined.[70] At the conclusion of the direct testimony of Ms. Kutil, her counsel stated, "I

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permissive." 1 T. Jacobs, CHILDREN AND THE LAW: RIGHTS AND OBLIGATIONS § 4:4 (2008) (footnote omitted).

[69] ***Exhibit 13.***

[70] *Id.* at 71. Instead, he stated, "I would reserve the right to recall Ms. Hess." *Id.*

have no further questions for Ms. Kutil."[71] At the conclusion of the testimony of petitioners' expert, their counsel stated, "I have no redirect, sir."[72]

After the guardian ad litem and DHHR indicated that they had concluded their evidence, the respondent afforded petitioners an opportunity to present additional evidence, and the following occurred:

> THE COURT: All right, Mr. Ciliberti. I'll get to you. How many other witnesses do you have this afternoon?
>
> MR. CILIBERTI: Your Honor, I was hoping to call three other witnesses and my clients.
>
> THE COURT: All right. And the three other witnesses, what were they going to testify to?
>
> MR. CILIBERTI: Actually, four other witnesses, plus my clients. Essentially, the four other witnesses are individuals who have been in the Kutil/Hess home, who have observed them interact with the parents (sic) and, in sum, will testify that these women are excellent parents, that there's a loving relationship between them and all of the children in their home. And, in sum, they would best be described as character witnesses.
>
> THE COURT: I don't think there's any dispute about that, Mr. Ciliberti. If there had been any dispute about it, I wouldn't have left this child in their home for the last eleven months. And for the purpose of this hearing, I don't think anyone is accusing your clients of mistreating this child in any way or giving this child inadequate care or inadequate treatment. . . . I assume, for the record, that your clients have taken proper care of this child. . . .[73]

Thereafter, after being permitted to offer the testimony of Mr. Kutil, the respondent understood that the evidence had been closed and permitted the parties to make their closing arguments, but

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[71] *Id.* at 201.

[72] *Id.* at 182.

[73] *Id.* at 184-186 (emphasis supplied).

when the petitioners' counsel was called upon last to make his closing argument, he cryptically stated:

> MR. CILIBERTI: The first issue, Your Honor, I have to protect the interests of my clients. I was not finished presenting evidence, and I would ask – obviously, it's 6:00. I don't –
>
> THE COURT: All right. I'll let you present that evidence when the Thanksgiving break is over with. I'm making a ruling today, Mr. Ciliberti.
>
> MR. CILIBERTI: Well, I'm asking for the opportunity to present additional evidence.
>
> THE COURT: All right. I'll let you present additional evidence, then, after the break. We've already spend six hours this afternoon. I'm going to issue a ruling today on the permanency plan, and I've heard all of the evidence I want to on that. . . . I want to hear what you have to say. . . . .[74]

Other than simply filibustering the hearing and causing further delay in an apparent effort to strengthen the petitioners' argument that the passage of time precluded the guardian ad litem, DHHR, the respondent, or anyone else from removing BGC from their home, petitioners' counsel never articulated at the hearing what additional evidence, other than irrelevant character evidence on the petitioners' fitness, which the respondent assumed and no one disputed. Likewise, the only additional "evidence" referenced in the petitioners' amended petition for writ of prohibition is "evidence as to their parenting and fitness,"[75] which again, was undisputed.

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[74] *Id.* at 212-213.

[75] ***Amended Petition for Writ of Prohibition*** at 8.

"The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion."[76]

R. Evid. 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." R. Evid. 402 further provides, "Evidence which is not relevant is not admissible." Here, evidence as to the petitioners' "parenting and fitness" by other witnesses who had observed their parenting skills was irrelevant as their parenting skills and fitness were not issues. Rather, whether the number of children in their home exceeded the statutory limit and whether it was appropriate to attempt to place the child in a two-parent adoptive family were the issues.

Moreover, R. Evid. 403 provides, "Although relevant, evidence may be excluded . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Here, both of the petitioners were permitted to complete their testimony concerning their parenting and fitness, and were permitted to complete the examination of their expert witness concerning those issues. R. Evid. 404 permits character evidence, but ordinarily only in criminal cases.[77] Thus, the respondent did not violate the petitioners' due process rights by excluding cumulative character evidence on issues not disputed.

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[76] Syl. pt. 1, *State v. Calloway*, 207 W. Va. 43, 528 S.E.2d 490 (1999).

[77] Syl. pt. 22, in part, *Lester v. Rose*, 147 W. Va. 575, 130 S.E.2d 80 (1963)("Ordinarily, evidence of good character or reputation of a party in a civil action is not admissible . . . .").

G. WHATEVER THEIR MARITAL STATUS OR SEXUAL ORIENTATION, FOSTER PARENTS HAVE NO CONSTITUTIONAL RIGHT TO ADOPT CHILDREN PLACED IN THEIR CARE.

Without reference to a single federal or state constitutional provision, or a single federal or state judicial decision determining that foster parents have a constitutional right to adopt children placed in their care, the petitioners have asserted that the respondent deprived them "of their fundamental rights to family, privacy and equal protection."[78]

First, the respondent is unaware of any constitutional right of "family" and the petitioners and BGC are not "family." They are unrelated by blood, marriage, or adoption. Certainly, this Court has considered "the role that foster parents play in abuse and neglect proceedings in view of the significant relationship they have developed with the child for whom they have cared."[79] For example, "foster parents are, subject to the court's discretion, entitled to participate in such proceedings."[80] "The level and type of participation [by the foster parents] in such cases," is not a constitutional entitlement, but "is left to the sound discretion of the circuit court with due with due consideration of the length of time the child has been cared for by the foster parents and the relationship that has developed."[81]

Second, the respondent is unaware of any constitutional right of "privacy" that applies to the circumstances of this case. There is no allegation of any violation of the fourth amendment or its state counterpart of the petitioners' right of privacy through any sort of warrantless search

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[78] ***Amended Petition for Writ of Prohibition*** at 12.

[79] *In re Clifford K.*, 217 W. Va. 625, 644, 619 S.E.2d 138, 157 (2005).

[80] *Id.*

[81] Syl. pt. 1, in part, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996).

of their home,[82] the right of access to which is a condition of their service as foster parents. There is also no violation of the federally-created right of privacy that protects a women's choice with respect to pregnancy termination.[83] Moreover, the United States Supreme Court in *Smith v. Organizations of Foster Families for Equality and Reform*,[84] rejected the argument that foster families are entitled to special due process protections when children are removed from their homes, reasoning as follows:

> It is, of course, true that "freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 639-640, 94 S. Ct. 791, 796, 39 L. Ed. 2d 52 (1974). There does exist a "private realm of family life which the state cannot enter," *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 442, 88 L. Ed. 645 (1944), that has been afforded both substantive and procedural protection. But is the relation of foster parent to foster child sufficiently akin to the concept of "family" recognized in our precedents to merit similar protection? Although considerable difficulty has attended the task of defining "family" for purposes of the Due Process Clause, *see Moore v. City of East Cleveland, supra*, 431 U.S., pp. 495, 97 S. Ct., p. 1934 (plurality opinion of Powell, J.); 531, 97 S.Ct., p. 1952 (Stewart, J., dissenting); 541, 97 S. Ct., p. 1957 (White, J., dissenting), we are not without guides to some of the elements that define the concept of "family" and contribute to its place in our society.
>
> First, the usual understanding of "family" implies biological relationships, and most decisions treating the relation between parent and child have stressed this element. *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212, 31 L.Ed.2d 551 (1972), for example, spoke of "(t)he rights to conceive and to raise one's

[82] *State v. Mullens*, 221 W. Va. 70, 90, 650 S.E.2d 169, 189 (2007)("'Any search of a person's house without a valid search warrant is an unreasonable search, under section 6, art. 3, [of the] Constitution of West Virginia [.]'")(citation omitted).

[83] *Women's Health Center of West Virginia, Inc. v. Panepinto*, 191 W. Va. 436, 446 S.E.2d 658 (1993).

[84] 431 U.S. 816, 842-45 (1977)(emphasis supplied and footnotes omitted).

children" as essential rights, *citing Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L.Ed. 1042 (1923), and *Skinner v. Oklahoma, ex rel. Williamson*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942). And Prince v. Massachusetts, stated:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." 321 U.S., at 166, 64 S. Ct., at 442.

A biological relationship is not present in the case of the usual foster family. But biological relationships are not exclusive determination of the existence of a family. The basic foundation of the family in our society, the marriage relationship, is of course not a matter of blood relation. Yet its importance has been strongly emphasized in our cases:

> "We deal with a right of privacy older than the Bill of Rights older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." *Griswold v. Connecticut*, 381 U.S. 479, 486, 85 S. Ct. 1678, 1682, 14 L. Ed.2 d 510 (1965).

See also Loving v. Virginia, 388 U.S. 1, 12, 87 S. Ct. 1817, 1823, 18 L. Ed. 2d 1010 (1967).

Thus the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot(ing) a way of life" through the instruction of children, *Wisconsin v. Yoder*, 406 U.S. 205, 231-233, 92 S .Ct. 1526, 1541-1542, 32 L. Ed. 2d 15 (1972), as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained

> continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family. For this reason, we cannot dismiss the foster family as a mere collection of unrelated individuals. *Cf. Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974).
>
> But there are also important distinctions between the foster family and the natural family. First, unlike the earlier cases recognizing a right to family privacy, the State here seeks to interfere, not with a relationship having its origins entirely apart from the power of the State, but rather with a foster family which has its source in state law and contractual arrangements. The individual's freedom to marry and reproduce is "older than the Bill of Rights," *Griswold v. Connecticut, supra*, 381 U.S., at 486, 85 S. Ct., at 1682. Accordingly, unlike the property interests that are also protected by the Fourteenth Amendment *cf. Board of Regents v. Roth*, 408 U.S., at 577, 92 S. Ct., at 2709, the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in "this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S., at 503, 97 S. Ct., at 1938. *Cf. also Meachum v. Fano*, 427 U.S., at 230, 96 S. Ct., at 2540 (Stevens, J., dissenting). Here, however, whatever emotional ties may develop between foster parent and foster child have their origins in an arrangement in which the State has been a partner from the outset. While the Court has recognized that liberty interests may in some cases arise from positive-law sources, *see, e. g., Wolff v. McDonnell*, 418 U.S. 539, 557, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935 (1974), in such a case, and particularly where, as here, the claimed interest derives from a knowingly assumed contractual relation with the State, it is appropriate to ascertain from state law the expectations and entitlements of the parties. In this case, the limited recognition accorded to the foster family by the New York statutes and the contracts executed by the foster parents argue against any but the most limited constitutional "liberty" in the foster family.

Finally, our Legislature has not seen the wisdom of prohibiting discrimination based upon sexual orientation. Indeed, in *Minshall v. Health Care & Retirement Corp. of America*,[85]

[85] 208 W. Va. 4, 537 S.E.2d 320 (2000).

this Court affirmed the dismissal of a suit for wrongful discharged alleged based upon discrimination for sexual orientation. Thus, even though West Virginia law does not discriminate against foster or adoptive parents based upon their sexual orientation,[86] it would not be a constitutional or statutory violation if the law did so discriminate.[87]

IV. CONCLUSION

Circuit judges are often called upon to make Solomon-like decisions in matters related to the custody of children. In this case, the petitioners became the foster parents of the child under circumstances where the outcome of the abuse and neglect proceedings was far from certain. Although opposed by the guardian ad litem from the outset, the respondent approved the continued temporary placement of the child with the petitioners as their sexual orientation was irrelevant. Once all parental rights were terminated, however, the matter came on for consideration of the child's permanent placement and potential adoption. At that point, both the

[86] Likewise, it has been held that discriminating between two-parent and one-parent adoptions does not violate equal protection. *See Jackson v. Tangreen*, 199 Ariz. 306, 18 P.3d 100 (Ariz. Ct. App. 2000).

[87] *See Opinion of the Justices*, 129 NH 290, 530 A2d 21 (1987)(exclusion of homosexuals from foster parentage or from being adoptive parents did not violate the due process clause of the United States Constitution or the New Hampshire Constitution); 4 Am. Jur. 2d *Adoption* § 19 (2008)("The view has been expressed that proposed state legislation which would exclude homosexuals from being adoptive parents would not violate the due process clauses, or any substantive rights to privacy, of either a particular state or the Federal Constitutions, nor would such legislation infringe upon any right of freedom of association under either Constitution. Similarly, denial of a petition by a nonmarital partner to adopt the minor child of the petitioner's nonmarital partner, does not violate the minor's right to equal protection guaranteed by 14th Amendment to United States Constitution by choosing to protect the best interests of those children in traditional families while not protecting best interests of children in nontraditional families, absent proof beyond a reasonable doubt that the relevant adoption statutes deprive the minor of the right to equal protection, as the legislative scheme of adoption statutes does not affect a fundamental right and are not based on a suspect classification and are rationally related to the legitimate governmental interest of protecting the traditional unitary family.")(footnotes omitted); Note, *The Fight to Be a Parent: How Courts Have Restricted the Constitutionally-Based Challenges Available to Homosexuals*, 38 New Eng. L. Rev. 841 (2004).

guardian ad litem and, eventually, DHHR, recommended permanent placement of the child with two parents.

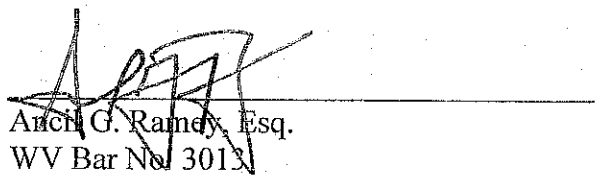
Both the lay and expert evidence presented to the respondent regarding the relevant benefits and detriments of a two-parent versus a one-parent adoption was conflicting. Although the infant has undoubtedly formed bonds with the petitioners, as would any foster child under the circumstances, neither of the two experts offered any specific testimony concerning whether the petitioners are the psychological parents of the child, let alone that, in this particular case, the benefit of a placement with a two-parent family is outweighed by the potential detriment of removing the child from her foster parents.

The respondent understands and acknowledges the impact of his ruling on the petitioners, but exercised his best judgment based upon the law and facts presented in the best interests of the child. The respondent's decision was not influenced by the petitioners' sexual orientation and, indeed, the respondent stated on the record that if a two-parent permanent placement cannot be made, consideration would be given to adoption by one of the petitioners. Rather, the respondent's decision was solely based upon what he believes is in the best interests of this child.

WHEREFORE, the respondent, the Honorable Paul M. Blake, Jr., Judge of the Circuit Court of Fayette County, respectfully requests that the request for a writ of prohibition be denied.

THE HONORABLE PAUL M. BLAKE, JR, JUDGE OF THE CIRCUIT COURT OF FAYETTE COUNTY

By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia ex rel. Kathryn Kutil and Cheryl Hess,

Petitioners,

v.) No. 34618

The Honorable Paul M. Blake, Jr, Judge of the Circuit Court of Fayette County; West Virginia Department of Health and Human Resources; and Martha Yeager Walker, Secretary,

Respondents.

VERIFICATION

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, TO-WIT:

I, Ancil G. Ramey, being first duly sworn, state that I have read the foregoing RESPONSE TO PETITION FOR WRIT OF PROHBITION, that the factual representations contained therein are true, except so far as they are stated to be on information and belief, and that insofar as they are stated to be on information and belief, I believe them to be true.

Ancil G. Ramey

Taken, subscribed and sworn to before me this 20th day of January, 2009.

My commission expires: Sept. 11, 2011

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
BARBARA K. MATTHEY
HC 61, Box 39
Frametown, WV 25623
My Commission Expires Sept. 11, 2011

Notary Public

CERTIFICATE OF SERVICE

I, Ancil G. Ramey, Esq. do hereby certify that on January 20, 2009, I served the foregoing "Response to Petition for Writ of Prohibition" by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

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EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE